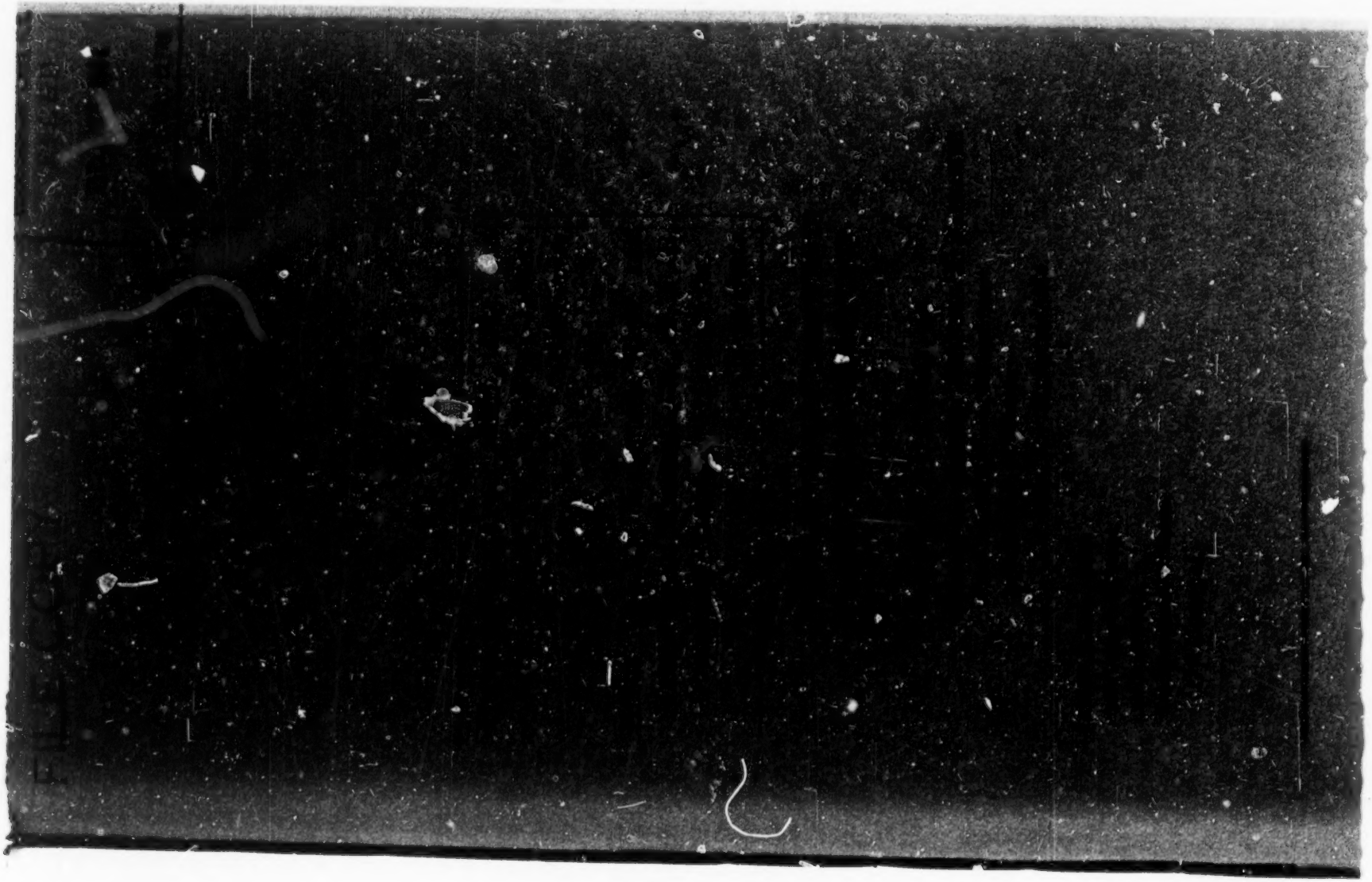

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 643

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Petitioners,

vs.

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now respondents above named and present herewith their brief in opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

INTRODUCTION

The instant Petition for Writ of Certiorari purports to assert rights of certain corporate entities, but no such corporate rights are involved herein. An examination of the judgment of the United States Court of Appeals for the Ninth Circuit (Appendix, Petition for Writ of Certiorari, pages 35-37) shows that the only party adversely affected by said judgment is the individual petitioner, John Janney, to the extent of a money judgment against him and in favor of the corporate entities. As is shown in detail below, the instant petition represents but a further attempt by the said John Janney to utilize the corporate entities for his own personal advantage.

Contrary to the contentions in the said Petition, there are no general principles of law involved here, which are applicable to others, neither is there involved any conflict whatever between the decision of the Court of Appeals on the points raised by Petitioner and any decision of any other Court of Appeals or any decision of this Court.

The instant Petition constitutes but an attempt by the said individual, John Janney, to have this Court review certain factual determinations adverse to him made in the trial court and affirmed by the Court of Appeals. Such "second appeal" is, of course, not within the purview of certiorari proceedings here.

Magnum Import Co. v. De Sportuno Coty, 262 U.S. 159, 163; 67 L. Ed. 922, 924.

QUESTIONS PRESENTED

Under this heading, Petitioner John Janney sets forth certain "questions" purportedly involved in the instant proceedings. Such purported "questions" are, in fact, not involved in these proceedings at all.

In order to demonstrate the truth of this statement, it is necessary to examine the circumstances of the case as the same are reflected in the official record. Such official record differs considerably from the "statement of the case" advanced by Petitioner. This latter "statement" is also "loaded with assertions, innuendoes and assumptions," (Appendix to Petition, page 2) and it therefore becomes necessary to set forth a corrected "statement of the case" in order that this Honorable Court may ascertain what really are the "questions presented."

STATEMENT OF THE CASE

For some twenty or thirty years, petitioner Janney conducted the affairs of the corporations involved herein, Pioche Mines Consolidated, Inc., and Ely Valley Mines, Inc., as a one-man corporation, without any stockholders' meetings whatever being held, with the possible exception of one in 1943 (T. 2372). The secretary-treasurer of the corporations admitted that he had been appointed by Janney (T. 707), that he never pried into the minutes of the corporation (T. 708), that corporate minutes were maintained only

up until 1944 (T. 714), that he had never attended any board of directors' meetings in the several years he had been there (T. 716), that he destroyed plaintiffs' demand for stockholders' meeting (T. 718), that nothing was ever done with a demand for stockholders' meeting from some 69 stockholders (T. 722), that requests for financial statements were ignored (T. 718), that there was an almost complete failure to maintain stockholders' records (T. 735, et seq.), that a purported list of directors filed by the corporations with the Nevada Secretary of State was not correct (T. 741), that none of the purported directors had been elected by the stockholders (T. 760), that no meeting of the purported directors had ever been held except for one or two in 1942 (T. 761). Evidence was introduced showing that one purported director had resigned (T. 1419, T. 1415), another purported director had had nothing to do with the companies for thirty years (T. 1421), a third purported director had denounced Janney for his outrageous frauds on the corporations and their investors, reciting that all of defendant Janney's associates in the corporate venture had theretofore disowned him (T. 1422-1425). It was shown that defendant Janney had so maintained, or, more correctly, failed to maintain, stockholders' records for twenty or more years, that it was impossible to call a stockholders' meeting (R. 730, T. 570, et seq., T. 735-738, T. 1603, et seq.).

The trial court, upon such evidence, correctly found that "At all times mentioned herein defendant Janney has wrongfully controlled, completely, all of the af-

fairs of the above named defendant corporations, to the detriment of the stockholders thereof" (R. 1246), that corporate records of stockholders have not been maintained so that the stockholders of the corporations cannot now be ascertained (R. 1247), that no valid stockholders' meetings have been held since, in the case of one corporation, its incorporation in 1928, with one exception in 1942 or 1943, that no "valid board of directors have been elected" (R. 1247).

Extensive additional findings were made by the trial court concerning defendant Janney's wrongs to the corporation performed by him as a result of his one-man control. None of these findings of fact of the trial court were disturbed by the Court of Appeals.

Because of the above state of affairs, plaintiff and several other stockholders instituted a representative action on behalf of the corporations, which stated a cause of action against defendant Janney alone (R. 39). Defendant Janney's contention, in the instant Petition, that the additional plaintiff stockholders had not authorized the action, is pure nonsense (T. 581, 592, 616).

For more than one year, defendant Janney remained out of the jurisdiction to avoid service of process "upon advice of counsel" (R. 534, T. 324), in order to "avoid harassment" (T. 1611, 1612). Defendant Janney claimed to be detained in the East by work on the corporate records at his home in Virginia (R. 251), but the secretary-treaurer of the corporations admitted that there were no corporate records there (T. 1162).

Despite the fact that no cause of action whatever was stated against the corporations (the corporations having been made nominal defendants only for purposes of jurisdiction), defendant Janney caused an answer to be filed purportedly on behalf of the corporations (R. 243) while he continued to remain outside the jurisdiction.

Plaintiffs thereupon sought to take the deposition of the corporations by and through their president, defendant Janney (R. 305, 282). Janney failed to appear (T. 709, 712). There was no protective order from the Court, and motion for default was filed (R. 304). Subsequent attempts were made to take the deposition of defendant Janney on three separate occasions (R. 532, 648, 688). On none of these occasions did defendant Janney appear (T. 323, 324, 382). No protective order was ever obtained.

On the last mentioned occasion, the Court specifically directed defendant Janney to appear (T. 467).

Upon the last mentioned occasion, counsel for defendant Janney appeared and stated that his client would not appear unless the Court, prior thereto, granted certain demands made by him (T. 398, 460-463). A claim of illness was made at that time, but counsel for defendant Janney admitted that Janney was at that time conducting his regular business, and taking trips (T. 471, 402, 468). It was admitted by Janney's counsel that Janney could have attended the hearing (T. 423-426), and, finally, that Janney's failure to appear was *not* because of his claimed ill-

ness (T. 942). Though the trial court offered to defer action if defendant Janney would appear, counsel for defendant declined (T. 482-486). The trial court attempted to verify the claim of illness by independent physicians (T. 408), which attempt was refused (T. 428-429, 460).

Upon this state of facts, the trial court entered the default on plaintiffs' complaint which, as above noted, stated a cause of action against defendant Janney alone for his wrongs against the corporation. These actions were upheld by the Court of Appeals (Appendix, Petition for Writ of Certiorari, pages 13-18).

The trial court thereupon conducted a trial which lasted one month (T. 507, 2514) which, though denominated a default hearing, involved an exhaustive presentation of evidence in which defendant Janney and his counsel fully participated. The evidence concerned Janney's wrongs to the corporations and their stockholders and showed, among other things, that defendant Janney, individually, misappropriated in excess of one million dollars of corporate assets. The evidence is reviewed in some detail by the Court of Appeals (Appendix, Petition for Writ of Certiorari, pages 20-23), and need not be reviewed here.

The judgment against defendant Janney for one million dollars (R. 1240), based upon proper findings (R. 1248), was, of course, upheld on appeal (Appendix, Petition for Writ of Certiorari, page 35).

This, essentially, is the judgment, affirmed on appeal, that defendant Janney now seeks to have this

Court review, under the guise of asserting "corporate" rights. To whatever extent the corporate entities have any interest to assert, as distinguished from the interests of defendant Janney, those interests are asserted in their counterclaim, which has been ordered reinstated by the Court of Appeals (Appendix, Petition for Writ of Certiorari, page 35).

It is therefore clear that the only true "question presented" in the instant Petition is whether Petitioner Janney may further use the corporate entities for his own individual purposes. In effect, Petitioner Janney is here attempting to assert that the corporations should not have the benefit of the million dollar judgment entered in their favor and against him!

INDISPENSABLE PARTIES

Under this heading, and under the headings "Indispensable Parties Damaged by Judgment" and "That the Judgment is 'In Favor of Pioche Consolidated' does not cure the Defect of Not Hearing Indispensable parties," Petitioner Janney argues that the corporate entities are indispensable parties in any representative suit, citing a host of authorities for this basic proposition of law.

The plain and simple answer to this contention is that the corporate entities are parties to the instant litigation, and have been from the outset.

"FUTURE LITIGATION"

Under this heading, Petitioner Janney argues that there may be future litigation arising out of the facts of this case.

Whether true or not, this contention, of course, furnishes no basis for the issuance of a writ of certiorari.

"BASIS FOR DEFAULT"

Under this heading, Petitioner Janney, if we understand correctly, argues that the trial court could not enter his default since he had, prior thereto, applied for relief under Rule 30(b) F.R.C.P.

Once again, the answer to this contention is clear and simple. As is shown in detail in the decision of the United States Court of Appeals (Appendix, Petition for Writ of Certiorari, pages 13-19), Janney's demand for relief under Rule 30(b) was rejected by the trial court, which said action was almost compelled by the factual circumstances described above. It would indeed be extraordinary if a litigant were permitted to control litigation, rather than the Court.

"BASIS FOR JUDGMENT"

Under this heading, Petitioner Janney argues, in effect, that the factual determinations made by the trial court, and sustained by the Court of Appeals, are in error.

Here again, the correctness of the determination of the trial court was reviewed by the Court of Appeals, and sustained (Appendix, Petition for Writ of Certiorari, pages 20-23). This obviously furnishes no ground for certiorari here.

CONCLUSION

It is respectfully submitted that Petitioner has failed completely to show any valid ground whatever for issuance of a writ of certiorari in the instant proceedings, and that the petition for the same should therefore be denied.

Dated, San Francisco, California,
December 23, 1964.

ARTHUR H. CONNOLLY, JR.
SULLIVAN, ROCHE, JOHNSON & FARRAHER
Counsel for Respondents.

JAMES FARRAHER
Of Counsel.